

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **NORTHBRIDGE GENERAL INSURANCE COMPANY** Applicant

AND:

AVIVA INSURANCE COMPANY Respondent

BEFORE: Mr. Justice Chalmers

COUNSEL: *D. Dacquisto and J. Tausendfreund* for the Applicant

D. Berlach and M. Connolly, for the Respondent

HEARD: August 26, 2021, by videoconference

ENDORSEMENT

OVERVIEW

[1] Northbridge General Insurance Company seeks a declaration that Aviva Insurance Company is required to contribute equally to the defence and indemnification of Enaiatreza Daneshvari.

[2] Mr. Daneshvari is a pharmacist. He was a Defendant in the action brought by Maria Domenica Manfredi, Anna Bested, Sinforo Manfredi and Candida Manfredi: Court File No. CV-19-615015-00 in the Ontario Superior Court of Justice at Toronto (Underlying Action). Mr. Daneshvari’s employer, 2169623 Ontario Inc., operated by Ayda Pharmacy (Ayda Pharmacy), was also a Defendant in the Underlying Action. Northbridge defended Mr. Daneshvari and Aviva defended Ayda Pharmacy. On May 11, 2021, Northbridge settled the Underlying Action in the amount of \$115,000 all-inclusive of claims, interest, costs and disbursements. Northbridge incurred \$36,317 in legal expenses in defending Mr. Daneshvari in the Underlying Action. Aviva did not contribute towards the settlement.

[3] Northbridge issued a professional liability insurance policy to members of the Ontario Pharmacists Association: policy no. CBC 0874964 (the Northbridge Policy). As a member of the Ontario Pharmacists Association, Mr. Daneshvari is an insured under the Northbridge Policy. Aviva issued a commercial general liability policy to Ayda Pharmacy: policy no. CMP 81646256 (the Aviva Policy). The Aviva Policy includes a Pharmacist Professional Liability Endorsement that extended liability coverage to pharmacists employed with Ayda Pharmacy. As an employee of Ayda Pharmacy, Mr. Daneshvari is also an insured under the Aviva Policy.

[4] Both the Northbridge and Aviva Policies include “other insurance” clauses that provide that their policies are excess to any other valid and collectible insurance. Northbridge argues that the “other insurance” clauses are irreconcilable and as a result, both insurers are required to contribute equally to the defence and indemnification of Mr. Daneshvari. Aviva argues that its policy is excess to any professional liability policy that provides coverage to Mr. Daneshvari and it is not required to defend or indemnify Mr. Daneshvari.

[5] For the reasons set out below, I find that the “other insurance” clauses are irreconcilable. I grant the relief sought and declare that Aviva is required to contribute equally with Northbridge to the defence and indemnification of Mr. Daneshvari.

BACKGROUND FACTS

The Underlying Action

[6] The Underlying Action commenced on February 25, 2019. It is alleged that Mr. Daneshvari is a duly qualified pharmacist who was employed with Ayda Pharmacy at the relevant time. It is also alleged that on June 23, 2018, Mr. Daneshvari delivered incorrectly labeled medication prescribed for Maria Manfredi. On June 26, 2018, Ms. Manfredi took the medication. Later that day she experienced fatigue, weakness and headaches. She fell to the floor and fractured her right hip.

[7] The Underlying Action was brought against both Mr. Daneshvari and Ayda Pharmacy. Northbridge defended Mr. Daneshvari and Aviva defended Ayda Pharmacy. In his Statement of Defence, Mr. Daneshvari admits he is a pharmacist and that he owns and operates Ayda Pharmacy. In its Statement of Defence, Ayda Pharmacy admits that Mr. Daneshvari is a pharmacist employed with Ayda Pharmacy. In response to the Plaintiff’s Request to Admit, Mr. Daneshvari admits that he “reviewed and sealed the subject blister pack, and prepared it for delivery, which process included affixing the address label to the delivery package.”

[8] On May 11, 2021, Northbridge settled the Underlying Action on behalf of Mr. Daneshvari in the amount of \$115,000 all-inclusive of claims, interest, costs and disbursements. The settlement is well below the Northbridge Policy limits. Aviva did not contribute towards the settlement but is not disputing the amount. The settlement is pending court approval because it involves minor Plaintiffs.

The Northbridge Policy

[9] Northbridge issued a Professional Liability Insurance Policy to members of the Ontario Pharmacists Association. Under the certificate of insurance, Mr. Daneshvari is the named insured.

[10] The insuring agreement of the Northbridge Policy provides as follows:

SECTION I – COVERAGES

(1) Insuring Agreement

The Insurer will pay on behalf of the “insured” all “damages” and “claims expenses” which the “insured” becomes legally obligated to pay as a result of any “claim” first made against the “insured” and reported in writing to the Insurer during the “policy period”, or Extended Reporting Period if exercised, for any “wrongful act”, committed before the end of the “policy period”.

[11] The Northbridge Policy includes the following condition:

SECTION VII - GENERAL CONDITIONS

(4) Other Insurance

This insurance is excess over any other valid and collectible insurance available to the “insured”, whether such insurance is stated to be primary, excess, contingent or otherwise. This does not apply to insurance which is purchased by the “insured” to apply in excess of the Policy.

The Aviva Policy

[12] Ayda Pharmacy purchased a Commercial General Liability policy from Aviva. The named insured is 21606623 Ontario Inc., operated by Ayda Pharmacy. The insuring agreement in the liability section of the Aviva Policy provides as follows:

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as “compensatory damages” because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “action” seeking those “compensatory damages”. However, we will have no duty to defend the insured against any “action” seeking “compensatory damages” for “bodily injury” or “property damage” to which this insurance does not apply.

[13] The Aviva Policy excludes coverage for bodily injury arising out of any professional services:

2. Exclusions

This insurance does not apply to:

[...]

n. Professional Services

“Bodily injury” (other than “incidental medical malpractice injury”), or “property damage” due to the rendering of or failure to render by you or on your behalf of any “professional services” for others, or any error or omission, malpractice or mistake in providing those services.”

[14] The Commercial General Liability Conditions includes the following condition:

8. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A, B or D of this Coverage Form, our obligations are limited as follows:

[...]

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(a) That is Property Insurance which also includes but is not limited to Builder’s Risk, Installation Floater or similar coverage for “your work” or for premises of others rented to you or occupied by you;

(b) If the loss arises out of the maintenance or use of watercraft to the extent not subject to Exclusion e. of Section 1 – Coverage A – Bodily Injury and Property Damage Liability

(2) Any other primary insurance available to you covering liability for “compensatory damages” arising out of the premises or operations or products-completed operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A, B or D to defend the insured against any “action” if any other insurer has a duty to defend the insured against that “action”. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

[15] Under the terms of the Aviva Policy there is no coverage for liability arising out of professional services. A Pharmacy Professional Liability Endorsement was added to the Aviva Policy to provide liability coverage for claims arising out of the professional services provided by pharmacists employed with Ayda Pharmacy:

PHARMACY PROFESSIONAL LIABILITY ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
[...]

2. With respect only to coverage provided by this endorsement Paragraph 2. Exclusions of SECTION 1 – COVERAGES – COVERAGE A. BODILY INJURY and PROPERTY DAMAGE LIABILITY is amended as follows:

a. Exclusion n. does not apply to professional health care services usual to a drug store or pharmacist.

[16] The endorsement also amended the “other insurance” clause to provide as follows:

ADDITIONAL CONDITIONS (applicable to this endorsement)

The following is added to the Other Insurance clause

The insurance provided under this endorsement is excess over any other valid and collectible insurance available to individual pharmacists for a loss we cover under this endorsement.

THE ISSUES

[17] The parties agree that the only issue to be determined on this Application is the following:

Whether the “other insurance” clause in the Aviva and Northbridge policies are irreconcilable such that the court should order that Aviva is required to equally contribute to the defence and indemnification of Mr. Daneshvari in the Underlying Action.

ANALYSIS

[18] The Northbridge Policy is a professional services liability policy issued to members of the Ontario Pharmacists Association. The Northbridge Policy includes an “other insurance” condition that provides it is “excess over other valid and collectible insurance available to the ‘insured’”. The Aviva Policy is a general liability policy. The Aviva Policy excludes claims arising out of professional services. Coverage for professional services was added into coverage through the Pharmacy Professional Liability Endorsement. The endorsement modified the “other insurance” condition to provide that coverage under the endorsement is “excess over any other valid and collectible insurance available to individual pharmacists.”

[19] Northbridge is seeking equitable contribution from Aviva with respect to the cost to defend Mr. Daneshvari and the amount it paid to settle the Underlying Action. The law with respect to equitable contribution is not in dispute. The principle is stated in *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, [2002] 2 S.C.R. 295:

[14] It is a well-established principle of insurance law that where an insured holds more than one policy of insurance that covers the same risk, the insured may never recover more than the amount of the full loss but is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary. The selected insurer, in turn, is entitled to contribution from all other insurers who have covered the same risk. This doctrine of equitable contribution among insurers is founded on the general principle that parties under a coordinate liability to make good a loss must share that burden pro rata. It finds its historic articulation in the words of Lord Mansfield C.J. in *Godin v. London Assurance Co.* (1758), 1 Burr. 489, 97 E.R. 419 (K.B.), at p. 420:

If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata, to satisfy that loss against which they have all insured.

[15] More recently, Ivamy's *General Principles of Insurance Law* (6th ed. 1993) set out at p. 518 the general principles concerning the right of contribution among insurers as follows:

- 1 All the policies concerned must comprise the same subject-matter.
- 2 All the policies must be effected against the same peril.
- 3 All the policies must be effected by or on behalf of the same assured.
- 4 All the policies must be in force at the time of the loss.
- 5 All the policies must be legal contracts of insurance.
- 6 No policy must contain any stipulation by which it is excluded from contribution.

[20] The starting point in the analysis is to determine whether the two policies cover the same risk, and at the same layer of coverage.

[21] I am satisfied that both policies cover the same risk. The Northbridge Policy provides coverage for the professional liability of pharmacists who are members of the Ontario Pharmacists Association. The Aviva Policy, through the Pharmacy Professional Liability Endorsement, provides coverage for the professional liability of pharmacists employed with Ayda Pharmacy. At

the time of the loss, Mr. Daneshvari was a member of the Ontario Pharmacists Association and an employee of Ayda Pharmacy. He was an insured under both policies. Both policies provide coverage for claims for bodily injury arising out of professional services.

[22] I am also satisfied that both policies provide coverage at the same layer of coverage.

[23] The Northbridge Policy is a primary policy. The “other insurance” clause in the Northbridge Policy provides that the clause does not apply if insurance is purchased by the “insured” to apply in excess of the Northbridge Policy. Here, the insured is Mr. Daneshvari. There is no evidence that he purchased other insurance that was designed to be excess. The Aviva Policy was purchased by Ayda Pharmacy. Based on the wording of the Aviva Policy, it is not a true excess policy; it is also a primary policy with an “other insurance” clause.

[24] The distinction between a true excess policy and a primary policy with an “other insurance” clause was considered by the Court of Appeal in *McKenzie v. Dominion of Canada General Insurance Company*, 2007 ONCA 480, 86 O.R. (3d) 419, at para. 39. The Court quoted with approval the following dicta of Charron, J. A. (as she then was) in *Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co.* (2001), 199 D.L.R. (4th) 654 (Ont. C.A.), at paras. 21-24, 26:

It is apparent from the Trial Judge's reasons that his finding that IARW's policy was excess was based solely on the "other insurance clauses" contained in the policy. In my view, this approach was fundamentally flawed. An insurance policy must be construed as a whole, not by its separate provisions. The trial judge failed to consider the fact that, apart from the possible effect of the other insurance clauses which must be considered in conjunction with other existing policies, there is nothing in the IARW policy to show an intent to provide anything other than primary coverage. The policy clearly provides for an obligation to pay and a duty to defend upon the happening of a specified occurrence without any reference to, or requirement that there be, underlying insurance. The policy further contains a clause that gives the insured permission to secure "other insurance being the excess of the insurance" provided by the policy. On its face, the IARW policy appears to be primary. Its character becomes much more apparent when the wording of the policy is compared to St. Paul's policy.

The wording used in the St. Paul policy is significantly different. The St. Paul policy clearly shows an intent not only to provide coverage with respect to certain risks but to limit the company's liability to the loss in excess to that which may be collected by the insured under any underlying insurance. Further, it obligates the insured to maintain underlying insurance to the extent provided for in Schedule A during the currency of the policy. If the insured fails to maintain the stipulated underlying insurance or its equivalent, the insurer's liability is limited to the amount for which it would have been held liable had the insurance been maintained. Therefore, in effect, the limits of the underlying policies listed in Schedule A operate as a kind of deductible. The policy also provides for "drop-down" coverage where there is no underlying insurance.

St. Paul's policy expressly and correctly identifies itself as an umbrella policy. An umbrella policy generally provides two types of coverage: standard form excess coverage; and broader coverage from that provided by the underlying insurance including a duty to defend lawsuits not covered by the underlying coverage. An umbrella policy is in effect a hybrid policy that combines aspects of both a primary policy and an excess policy.

The distinction between primary and excess insurance is succinctly set out in *St. Paul Mercury Insurance Company v. Lexington Insurance Company*, 78 F.3d 202 (5th Cir. 1996), at footnote 23, quoting from *Emscor Mfg Inc. v. Alliance Ins. Group*, 879 S.W.2d 894 at 903 (Tex. App. 1994), writ denied):

Primary insurance coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to the liability. An excess policy is one that provides that the insurer is liable for the excess above and beyond that which may be collected on primary insurance. In a situation where there are primary and excess insurance coverages, the limits of the primary insurance must be exhausted before the primary carrier has a right to require the excess carrier to contribute to a settlement. In such a situation, the various insurance companies are not covering the same risk; rather, they are covering separate and clearly defined layers of risk. The remote position of an excess carrier greatly reduces its chance of exposure to a loss. This reduced risk is generally reflected in the cost of the excess policy.

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Based on the foregoing, I conclude that the IARW coverage is primary. The "other insurance" clauses in the policy do not change this characterization. The only effect of the "other insurance clauses" would be to require a second primary insurance carrier to share in IARW's liability. The key to the obligation to share is that the other carrier would have to provide coverage at the same level, in this case primary coverage, and not excess coverage that insures a "separate and clearly defined layer of risk". A primary insurer cannot use an "other insurance clause" to require an umbrella carrier to share in its liability.

[25] The Northbridge and Aviva policies do not require the insured to maintain an underlying policy of insurance or that the limits of the underlying insurance must be exhausted before the insurer is required to respond. The policies require the insurer to respond upon the happening of a specified occurrence without any requirement that there be underlying insurance.

[26] Having found that both policies provide primary liability coverage, the next step in the analysis is to determine whether the “other insurance” clause in the policies limit the insurer’s obligation to contribute.

[27] In determining the intention of the insurers to limit their obligations, the court is to consider only the policy wording. The analysis is not to be based on the surrounding circumstances or which policy is more specific or closer to the risk. If the intention to limit the obligations is not clearly set out in the policy, or if the competing intentions of the insurers cannot be reconciled, the principles of equitable contribution require the parties to equally share the costs of defence and indemnity: *Family Insurance*, at paras. 19, 23-28.

[28] The existence of competing “other insurance” clauses in two different primary policies does not automatically result in the conclusion that the principle of equitable contribution ought to apply. The equitable contribution principle will be applied only if the court “cannot possibly reconcile” the “other insurance” clauses. If the competing clauses can be reconciled so as to give effect to both policies while providing coverage to the insured, there is no “mutual repugnancy” and the court is to give effect to the intention of the insurers: *Family Insurance*, at paras. 33-39.

[29] Northbridge argues that the “other insurance” clauses in the Northbridge and Aviva policies are effectively the same and cannot be reconciled. The Northbridge Policy provides that it is “excess over other valid and collectible insurance available to the “insured”. The Aviva Policy provides that the coverage provided under the Pharmacy Professional Liability Endorsement, is “excess over any other valid and collectible insurance available to individual pharmacists”. The primary difference between the two “other insurance” clauses is that in the Northbridge Policy, coverage is excess to any insurance available to the insured and in the Aviva Policy, coverage is excess to any insurance available to the individual pharmacist.

[30] Northbridge argues that the wording used in the policies, is similar to the wording considered in *TD General Insurance Company v. Intact Insurance Company*, 2019 ONCA 5, 144 O.R. (3d) 342. In that case, the plaintiff was injured while riding in a boat and sued the operator. The operator had coverage under two insurance policies: the boat owner’s homeowner’s policy and his own homeowner’s policy. Both policies had identical “other insurance” clauses which provided that “if you have other insurance, which applies to a loss or claim, or would have applied if this policy did not exist, this policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance is used up”. The court concluded that both policies provided primary coverage and the “other insurance” clauses were irreconcilable. The two insurers were required to share equally: *TD General Insurance*, at paras. 21-22.

[31] Aviva argues that the wording of its policy specifically limits its coverage to being excess to any professional liability policies available to the individual pharmacist. The Aviva Policy is a general liability policy which excludes coverage for professional liability claims. However, the Pharmacy Professional Liability Endorsement extends coverage for professional services. Aviva argues that for pharmacists with their own liability coverage, the endorsement provides excess coverage. Mr. Daneshvari had his own liability coverage through Northbridge, and therefore, Aviva is required to respond only after the limits of the Northbridge Policy are exhausted. Aviva states that the specific wording in its “other insurance” clause, which provides it is excess to insurance available to individual pharmacists, ought to prevail over the general wording in the

Northbridge “other insurance” clause, which provides that it is excess to insurance available to the insured.

[32] Aviva relies on *Lawyers’ Professional Indemnity Company (LPIC) v. Lloyd’s Underwriters*, 2016 ONSC 6196. In that case, the court refused to order a general liability insurer to contribute to the defence and indemnity obligations owed by a professional liability insurer. The court found that the two competing “other insurance” clauses were not irreconcilable. The Lloyd’s policy, which provided general liability coverage, specifically provided that its coverage was excess to any professional liability coverage provided by any Law Society. The LPIC policy was a professional liability policy. The LPIC policy provided that if the insured has other insurance that is arranged to be excess insurance, the other policies are to be treated as excess. The court found that based on the wording of each policy, the Lloyd’s policy was in an excess position in relation to the LPIC policy. The two policies were not irreconcilable, and Lloyd’s was not required to contribute towards the defence or indemnity of the insured.

[33] Aviva states that Northbridge is a professional liability insurer in the same position as LPIC and therefore Northbridge is not entitled to contribution from Aviva, which is a general liability insurer. The Lloyd’s policy states that it was excess to any professional liability policy provided by any Law Society. The Aviva Policy provides that it is excess to any policy issued to the individual pharmacist. Aviva argues that both the Lloyd’s and Aviva policies provide that the general coverage provided in their policies is excess to any policy that specifically provides professional liability coverage.

[34] Aviva relies on the following statement from the Application decision in *LPIC*, at para. 13:

In my view, the Lloyd’s policy is in an excess position in relation to the LawPro policy. The “other insurance” provisions do not cancel each other out. As a matter of construction and interpretation, the specific language used contained in the Lloyd’s policy ought to prevail over the more generally-framed provisions in the LawPro policy.

[35] The *LPIC* case was appealed: *Lawyer’s Professional Indemnity Company v. Lloyd’s Underwriters*, 2017 ONCA 858. The Appellant, LPIC, argued that the application judge erred in applying the Minnesota approach in finding that it was not entitled to contribution from Lloyd’s. The Minnesota approach considers which policy is more specific or closer to the risk. The Court of Appeal noted that the Minnesota approach was rejected by the Supreme Court of Canada in *Family Insurance*. The Court of Appeal found that the application judge did not consider which policy was closer to the risk, but instead took the correct approach in comparing the wording of the two competing policies. Based on the policy wording, the court found that the intention of LPIC was to provide primary coverage if there were excess policies that provided coverage to the insured. At paras. 1-3, the Court of Appeal stated:

The appellant argues that the application judge erred in finding that the insurance policy issued by the respondent was excess to the policy issued by the appellant. In its submission, the application judge erroneously arrived at this conclusion by applying the Minnesota approach to resolve whether a policy is excess to another policy. Pursuant to that approach, the court asks which of the insurers intended

more clearly to insure the particular risk. The Minnesota approach has been rejected by the Supreme Court of Canada in *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, [2002] 2 S.C.R. 695.

In our view, the application judge did not apply the Minnesota approach to determine whether the respondent's policy was excess to the appellant's. The application judge understood that he was called upon to interpret the terms of the two relevant insurance policies. It is based on the terms of the policies that he found that the respondent's was specifically made excess to the appellant's.

Further, the appellant's policy acknowledges that other policies, specifically arranged to apply as excess insurance over the appellant's policy, were to be treated as being excess policies. We see no error in the application judge's analysis.

[36] I find that the *LPIC* case is distinguishable on its facts. Based on the wording of the Northbridge and Aviva policies, both provide primary coverage. Neither policy was specifically arranged to be treated as being excess to the other.

[37] The general liability policy issued by Aviva excludes coverage for liability arising out of professional services. The Pharmacists Professional Liability Endorsement removed this exclusion and added professional liability coverage to the Aviva Policy. At that point, Aviva became a primary insurer of Mr. Daneshvari, for liability arising out of professional services. The endorsement does not include a term that requires the insured to maintain an underlying policy, or that the limits of the underlying policy must be exhausted before there is coverage under the endorsement. If it had done so, Aviva would not be a primary insurer and would not be at the same layer of coverage as Northbridge. In those circumstances, the Aviva Policy would be a true excess policy and it would not be necessary to consider the "other insurance" clauses in the two policies.

[38] The Northbridge and Aviva policies are valid and provide primary professional services liability coverage to Mr. Daneshvari with respect to the claims made against him in the Underlying Action. In my view, the "other insurance" clauses in the two policies are effectively the same. The Northbridge Policy states that it is excess to any insurance available to the insured and the Aviva Policy states that it is excess to any insurance available to the individual pharmacist.

[39] There is no reason to prefer one "other insurance" clause over the other. The fact that the Aviva "other insurance" clause includes the words "individual pharmacist" does not result in the Aviva Policy being in an excess position. The intention of both insurers, as expressed in the "other insurance" clauses, is that, in the case of a claim against an individual pharmacist for professional liability, its policy is excess to any other policy that provides coverage to the insured. I find that the "other insurance" clauses are irreconcilable. As a result, both insurers are required to share equally in the defence and indemnification of Mr. Daneshvari in the Underlying Action.

DISPOSITION

[40] I grant the declaration sought and find that Aviva is required to contribute equally to the defence and indemnification of Mr. Daneshvari in the Underlying Action.

[41] Northbridge is successful on this Application and is presumptively entitled to its costs. Following the hearing of the Application, I received Bills of Costs from each of the parties. Based on the amounts claimed, I expect the parties will be able to agree on costs. If not, Northbridge may file written submissions of no more than three pages in length within 20 days of the date of this endorsement. Aviva may file its written submission in response on the same basis within 20 days of receiving Northbridge's submissions.



C. HALMERS, J.

DATE: OCTOBER 13, 2021